

: Order Vacating Decision and
: Remanding Case
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: Docket No. IBIA 92-183-A
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: September 21, 1992

This is an appeal from an April 28, 1992, decision of the Acting Phoenix Area Director, Bureau of Indian Affairs (Area Director; BIA), denying appellant's application for a FY 1992 Planning Grant. For the reasons discussed below, the Board vacates the Area Director's decision and remands this case to him for further consideration.

The availability of funding for the FY 1992 Planning Grant Program was announced in the Federal Register on January 2, 1992. 57 FR 160. Appellant submitted an application pursuant to that announcement. By letter dated April 28, 1992, the Area Director informed appellant that its "application did not rank high enough among the twelve tribal applications received to be considered for a grant under the terms of the announcement." The Area Director's letter continued:

The application was weak or deficient in these areas:

When a Tribe is requesting a planning grant, which encompasses activities identified as reservation resources development, the Tribe must also satisfy one or more of the following additional conditions:

(a) The Tribe has successfully administered other developmental projects and has done so without governmental or political interference.

(b) The Tribe's plan reflects its willingness to accept guidance and assistance for the modification, if necessary, of its comprehensive development plan from subject matter experts; and/or

(c) The Tribe's plan reflects its willingness to accept monitoring and technical assistance as may be arranged by subject matter experts to ensure the best opportunity for success of the grant activity.

(d) A description of the personnel required, if any, to carry out grant activities, and/or objectives and provide position descriptions, which include qualifications for education and experience. The Tribe has selected staff already on board.

(e) The applicant must certify that no elected tribal official will receive a salary or any other form of compensation from a grant under this announcement. The Tribe made a statement to this effect, but no certification.

(f) The applicant must complete a Certification Regarding Drug-Free Workplace Requirements. A statement was made and referred to the Tribal Employee Handbook. Again, no certification.

(Area Director's Letter at 1).

The Tribe apparently requested further explanation of the denial. By letter of June 3, 1992, the Area Director expanded somewhat on the reasons given in his April 28 letter. He also added two new reasons for denial.

Reasons (a), (b), and (c) in the Area Director's April 28 letter derive from subsection C(2)(b) of the Federal Register announcement, concerning certain eligibility criteria. Subsection C(2)(b) required that, for certain planning grants, tribes must satisfy one or more of the three conditions listed. The Area Director found that appellant failed to satisfy any of the conditions in the subsection. Appellant disagrees with BIA's analysis of its application in this regard. However, mere disagreement with BIA's analysis is not sufficient to carry appellant's burden of proof here. As the Board has stated on a number of occasions, in appeals arising under 25 CFR Part 2, an appellant bears the burden of proving that BIA's decision is erroneous or not supported by substantial evidence. Sauk-Suiattle Indian Tribe v. Portland Area Director, 20 IBIA 238 (1991). The Board finds that appellant has failed to show error in the Area Director's analysis of its application under subsection C(2)(b).

Reasons (d), (e), and (f) derive from subsections C(4)(c), (e) and (i) of the Federal Register announcement, concerning items required to be included in a planning grant application. ^{1/} Reason (d) concerns personnel. Although the Area Director's letter identified appellant's application as weak in this area, one of the three raters who rated appellant's application found that appellant had satisfied the requirement and the other two found that the requirement was not applicable to appellant's application. Accordingly, this reason for denial is in conflict with the administrative record. Further, the Area Director appears to have concluded that appellant's application was weak in this area because appellant planned to use staff already on board. However, there is no indication in the Federal Register announcement that a plan which proposed to use existing staff would be considered

^{1/} Contrary to the implication in the Area Director's letter, all items identified in paragraphs (d), (e), and (f) of the letter were required to be submitted with a planning grant application. These were not alternative requirements as the letter suggests.

less worthy than others. Cf. Oneida Indian Nation v. Deputy Commissioner of Indian Affairs, 21 IBIA 215 (1992). The Board finds that reason (d) is not a valid ground for denial of appellant's application.

Reasons (e) and (f) concern the absence of certain required certifications from appellant's application. Appellant argues that the requirements were met by a certified tribal council resolution authorizing submission of its grant application and by appellant's employee handbook included with its application. These are, however, clearly not the certifications contemplated in subsections C(4)(e) and (i). The Board finds that the Area Director's decision is supported with respect to these two reasons for denial.

As noted above, the Area Director gave two additional reasons for denying appellant's application in his June 3, 1992, letter. The Board has stated that it is an abuse of discretion and a denial of due process for BIA to deny an application for financial assistance for reasons not stated in the denial decision. Price v. Portland Area Director, 18 IBIA 272 (1990). The Board finds therefore that these two reasons are not valid reasons for denial of appellant's application.

The Board has found that reason (d) in the Area Director's decision letter and the two reasons given in his June 3, 1992, letter are improper. The Board is unable to determine from the administrative record whether appellant's application would have been approved, but for consideration of these invalid reasons. The Area Director's decision must be vacated, and this matter remanded to him for a determination of whether, without consideration of the invalid reasons, appellant's application would have been approved or denied. If he concludes that appellant's application would have been approved, the Area Director shall further determine an appropriate remedy, if, as the Board assumes, funds for the FY 1992 Planning Grant program have all been distributed.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Area Director's decision is vacated, and this matter is remanded to him for further consideration in accordance with this opinion.

Anita Vogt
Administrative Judge

Kathryn A. Lynn
Chief Administrative Judge